IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE COCHISE COUNTY MENTAL HEALTH NO. 201800002

No. 2 CA-MH 2018-0002
Filed November 5, 2018

Appeal from the Superior Court in Cochise County
No. MH201800002
The Honorable Wallace R. Hoggatt, Judge

AFFIRMED

COUNSEL

Emily Danies, Tucson
Counsel for Appellant

Brian M. McIntyre, Cochise County Attorney
By Christine J. Roberts, Civil Deputy County Attorney, Bisbee
Counsel for Appellee

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Eckerstrom concurred.

B R E A R C L I F F E, Judge:

¶1 D.M. appeals from the trial court's order that he undergo mental health treatment. He argues the court violated his due process rights by conducting a hearing pursuant to a petition for court-ordered treatment in his absence and by proceeding without a complete record "of all drugs, medication or other treatment that the person has received during the seventy-two hours immediately before the hearing" as required by A.R.S. § 36-539(A). We affirm.

¶2 In January 2018, the state filed a petition for court-ordered treatment alleging that, due to a mental disorder, D.M. was a danger to others and persistently or acutely disabled. At the hearing on that motion, the trial court confirmed with D.M.'s counsel and the state that they had agreed they would "submit this matter to the court" on the issue whether D.M. was persistently or acutely disabled, and that the court would rely on documents already submitted to make that determination. It also confirmed with counsel that D.M. would "not be transported to the hearing" due to "some medical concern which required he be transported to [a hospital] in Tucson where he is presently located." The state informed the court that, although there was an affidavit from D.M.'s treatment facility about "medications that the patient has had in the past 72 hours," there was no affidavit from the Tucson hospital to which D.M. had been transported. D.M.'s counsel responded he did not "have an issue with the absence of the second report." As to D.M.'s absence, counsel further explained:

> [S]omething came up medically that required him to be moved. And I didn't have him transported specifically because he requested it; it was just that it wasn't clear that he was declining to participate. And I don't like to waive if there's an issue of understanding that. So circumstances being as they are, he's in [the hospital].

¶3 The trial court concluded, based on the evidence, that D.M. "does suffer from a mental disorder which renders him persistently or acutely disabled; he is in need of treatment and is either unable or unwilling to accept voluntary treatment." The court imposed a treatment plan, and this appeal followed.

¶4 On appeal, D.M. first argues the trial court was required to determine whether he had some other means of attending the hearing. He relies on § 36-539(C), which states:

> If the patient, for medical or psychiatric reasons, is unable to be present at the hearing and cannot appear by other reasonably feasible means, the court shall require clear and convincing evidence that the patient is unable to be present at the hearing and on such a finding may proceed with the hearing in the patient's absence.

¶5 A "patient and the patient's attorney shall be present at all hearings." § 36-539(B). However, "[t]he patient may choose to not attend the hearing or the patient's attorney may waive the patient's presence." *Id.* The state argues counsel waived D.M.'s presence. We agree counsel's statements could be interpreted as an express waiver of D.M.'s presence. But we need not resolve that question because D.M. has cited no authority suggesting his counsel's waiver of his presence must be express. *See State v. Collins*, 133 Ariz. 20, 22-23 (App. 1982) (counsel may implicitly waive defendant's presence without consultation with defendant).

¶6 Counsel implicitly waived D.M.'s presence by allowing the proceeding to continue in his absence without objecting or asserting the trial court was required to make further findings under § 36-539(C). Further, at the outset of the hearing, counsel for the parties affirmed an agreement between D.M. and the state, related to the court by email earlier in the day, acknowledging that D.M. would not be transported to the hearing.

¶7 We reject D.M.'s argument the trial court had an "independent duty to inquire into alternative means of appearance." In support, he cites *In re MH 2010-002637*, 228 Ariz. 74 (App. 2011). In that case, counsel presented testimony the patient was unable to attend the

hearing due to a medical condition but did not request that the trial court evaluate, pursuant to § 36-539(C), whether the patient could attend the hearing by other means. *Id.* ¶¶ 5, 7. We determined the trial court was nonetheless required "to at least consider alternative means of appearance when the patient cannot otherwise attend." *Id.* ¶ 23. We find this reasoning inapplicable here. As noted, counsel did not present testimony that D.M. could not attend, object to proceeding in his absence, or otherwise invoke § 36-539(C). In light of counsel's implicit waiver of D.M.'s presence, we decline to impose on the court a duty to sua sponte evaluate whether D.M. would be able to attend by other means.

¶8 We also reject D.M.'s argument that the trial court violated § 36-539(A) absent evidence about any medications D.M. had been given at the hospital in Tucson. Counsel avowed that he had spoken with D.M. and that D.M. had continued to refuse medication, and no additional evidence was necessary. D.M. has not explained why counsel's avowal did not constitute an appropriate "record of all drugs, medication or other treatment that the person has received during the seventy-two hours immediately before the hearing" as required by § 36-539(A). And, in any event, any error plainly was waived below. *See In re MH 2006-000023*, 214 Ariz. 246, ¶ 8 (App. 2007) (absent statutory prohibition against waiver, statutory requirement waived if not raised below).

¶9 We affirm the trial court's order that D.M. undergo involuntary treatment.